

APR 12 1976

MICHAEL W. J. JR., CLERK

# In the Supreme Court of the United States

October Term, 1975

No. .... **75-1452**

KIMBELL, INC., d/b/a FOODWAY,  
FURR'S, INC., SAFEWAY STORES, INC., and  
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY  
*Appellants,*

vs.

EMPLOYMENT SECURITY COMMISSION  
OF THE STATE OF NEW MEXICO

and

LANA JEAN NOLAN, *et al.*,  
*Appellees.*

On Appeal From The Supreme Court Of The  
State Of New Mexico

## JURISDICTIONAL STATEMENT

ROBERT P. TINNIN, JR.  
PAULL MINES

816 Bank of New Mexico Building  
Albuquerque, New Mexico 87102  
*Attorneys for Appellants*

Kimbell, Inc., d/b/a Foodway,  
Furr's, Inc., and Shop Rite  
Foods, Inc., d/b/a Piggly  
Wiggly

JOHN B. TITTMAN

P. O. Drawer AA  
Albuquerque, New Mexico 87102  
*Attorney for Appellant*  
Safeway Stores, Inc.

## TABLE OF CONTENTS

	Page
OPINIONS BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
QUESTION PRESENTED BY APPEAL .....	4
STATEMENT OF THE CASE .....	4
Facts Material to the Consideration of the Question Presented .....	4
Manner in Which the Federal Question was Raised .....	7
FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL .....	9
CONCLUSION .....	16
APPENDIX	
Names of All Individual Claimants .....	1a
Decision of the Supreme Court of the State of New Mexico .....	3a
Opinion of the Supreme Court of the State of New Mexico in <i>Albuquerque- Phoenix Express, Inc. v. Employment Security Commission</i> .....	4a
Order of the Supreme Court of the State of New Mexico denying rehearing .....	21a
Notice of Appeal to the Supreme Court of the United States .....	22a

## TABLE OF AUTHORITIES

<i>Cases:</i>	<i>Page</i>
Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, N.M. . . . , 554 P.2d 1161 (1975) . . . . .	2, 8
Bryant v. Zimmerman, 278 U.S. 63 (1928) . . . . .	2
Department of Banking v. Pink, 317 U.S. 264 (1942) . . . . .	2
Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973) <i>cert. denied</i> , 414 U.S. 853 (1973) . . . . .	13
Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations, 405 F.Supp. 275 (D. Hawaii 1975) . . . . .	8, 13, 14
ITT Lamp Division v. Minter, 435 F.2d 989 (1st Cir. 1970), <i>cert. denied</i> , 402 U.S. 933 (1971) . . . . .	13
Largent v. Texas, 318 U.S. 418 (1943) . . . . .	2
Lawrence v. State Tax Commission, 286 U.S. 276 (1932) . . . . .	2
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) . . . . .	9
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) . . . . .	9, 10
Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) . . . . .	11, 12, 14
Teamsters Local 20 v. Morton, 377 U.S. 252 (1964) . . . . .	9, 10

## TABLE OF AUTHORITIES

<i>Constitutional Provisions and Statutes:</i>	<i>Page</i>
United States Constitution, Article VI, <del>Clause 2</del> . . . . .	3, 4, 7, 8, 9, 13, 15
28 U.S.C. §1257(2) . . . . .	2
28 U.S.C. §2103 . . . . .	3
29 U.S.C. §§ 157-158 . . . . .	7, 9
§59-9-5(d) N.M. Stat. Ann. (Supp. 1975) . . . . .	2, 3
New Mexico Unemployment Compensation Law of 1936, §§59-9-1 through 59-9-29 N.M. Stat. Ann. (2nd Repl. 1974), <i>as amended</i> (Supp. 1975) . . . . .	3
<i>Books and Articles:</i>	
A.B.A. Sec. of Lab. Law, 1972 Committee Reports . . . . .	15
Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972) . . . . .	10, 11
A. Thieblot, Jr. and R. Cowin, <i>Welfare and Strikes, the Use of Public Funds to Support Strikes</i> (1972) . . . . .	12, 13

**In the Supreme Court of the United States**

October Term, 1975

No. ....

---

KIMBELL, INC., d/b/a FOODWAY,  
FURR'S, INC., SAFEWAY STORES, INC., and  
SHOP RITE FOODS, INC., d/b/a PIGGLY WIGGLY  
*Appellants,*

vs.

EMPLOYMENT SECURITY COMMISSION  
OF THE STATE OF NEW MEXICO

and

LANA JEAN NOLAN, *et al.*,<sup>1</sup>  
*Appellees.*

---

On Appeal From The Supreme Court Of The  
State Of New Mexico

---

**JURISDICTIONAL STATEMENT**

---

**OPINIONS BELOW**

The decision of the Supreme Court of the State of New Mexico is unreported but is set forth in the Appendix, *infra* at p. 3a. The decision of the Supreme Court of the State of New Mexico on Appellant's Motion for Rehearing is also unreported but is set forth in the Appendix, *infra* at p. 21a.

---

<sup>1</sup>This appeal concerns unemployment compensation claims by 198 individuals employed by Appellants herein. The names of all claimants are set forth in the Appendix, *infra* pp. 1a-2a.

The opinion of the Supreme Court of the State of New Mexico in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, which the Supreme Court for the State of New Mexico incorporated as the basis for its decision in this case is reported at N.M. , 554 P.2d 1161 (1975) and is set forth in the Appendix, *infra* at pp. 4a-20a.

### JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of §59-9-5(d), N.M. Stat. Ann. (Supp. 1975), on the ground that it is repugnant to the Constitution of the United States, insofar as the statute has been interpreted by the Supreme Court of the State of New Mexico as not disqualifying employees engaged in a strike against their employer from receipt of unemployment compensation benefits.

The decision of the Supreme Court of the State of New Mexico sought to be reviewed on this appeal was rendered on December 29, 1975. An order denying the motion for rehearing by these Appellants was entered January 15, 1976. On March 24, 1976, a timely Notice of Appeal to this Court was filed in the Supreme Court of the State of New Mexico. See *Department of Banking v. Pink*, 317 U.S. 264 (1942). As the Appellants properly and in a timely manner drew into question the validity of §59-9-5(d), N.M. Stat. Ann. (Supp. 1975), on the ground that it is repugnant to the Constitution of the United States and such contention was rejected by the Supreme Court of the State of New Mexico, this matter is appropriately brought to this Court by appeal. See *Largent v. Texas*, 318 U.S. 418 (1943); *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932); *Bryant v. Zimmerman*, 278 U.S. 63 (1928).

In the event that this Court does not consider appeal the proper mode of review, Appellants request that, pursuant to 28 U.S.C. §2103, the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari as if duly presented to this Court at the time the appeal was taken.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of Article VI of the Constitution of the United States. Also involved is the labor dispute disqualification provision of §59-9-5(d) N.M. Stat. Ann. (Supp. 1975), a portion of the New Mexico Unemployment Compensation Law of 1936, §§59-9-1 through 59-9-29 N.M. Stat. Ann. (2nd. Repl. 1974) *as amended* (Supp. 1975), which provides that an applicant for unemployment compensation shall be disqualified for benefits under the following circumstances:

(d) For any week with respect to which the commission finds that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that —

(1) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; Provided, that if in any case separate branches of work

which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises.

#### QUESTION PRESENTED BY APPEAL

Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?

#### STATEMENT OF THE CASE

##### *1. Facts Material to the Consideration of the Question Presented.*

The Appellants in this case all operate retail food stores in Albuquerque, Santa Fe and Los Alamos, New Mexico. For at least fifteen years prior to 1971, these employers associated themselves in a multi-employer bargaining unit for purposes of collective bargaining with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 391, concerning the terms and conditions of employment of the meat department employees of these Appellants and other employers. (R. 167). On or about August 30, 1971, the Appellants entered into negotiations with Local 391 for the purpose of negotiating a collective bargaining contract to replace the agreement which was to expire on October 21, 1971. (R. 167).

Negotiations between the employers and the union progressed but were not productive of a new contract by the

expiration date of the old contract. (R. 168). During discussions on October 22, spokesmen for Local 391 informed two of the spokesmen of the Appellants herein that if agreement were not reached on that date the union would strike Appellant, Shop Rite Foods, Inc., and if necessary would proceed to strike each of the employers one at a time until they had all capitulated to the union's demands. (R. 168). The union also informed all of the employer representatives at the bargaining table that if a settlement were not reached by Saturday morning, October 23, 1971, a strike would be called against one of the employers. (R. 168). Negotiators for all of the employers informed the union representative that in order to avoid the effects of the union's "whip saw" tactics, a strike against one of the employers would be considered and treated as a strike against all of them. (R. 168).

No settlement having been reached, the employees of Shop Rite Foods, Inc., failed to report for work on October 23, 1971, and picket lines were established by Local 391 at stores owned by that company. (R. 168). Meat department employees employed by the remaining employers did report for work at their respective stores on the morning of October 23, 1971, but in response to the strike activity commenced against Shop Rite Foods, Inc., the other employers informed their employees, all member of the union, that they would not be permitted to work during the continuation of the strike against Shop Rite Foods, Inc. (R. 168). Picket lines were subsequently established at the stores of all the Appellants by members of the meat cutters union. (R. 168).

As a result of the strike, all union employees of the meat market departments of the employers in the multi-employer bargaining unit in Albuquerque, Santa Fe and Los Alamos, New Mexico, were out of work during the period from October 23, 1971, to December 4, 1971, when a

contract settlement was concluded. (R. 170). During the period of the strike claims for unemployment compensation were filed by 226 employees employed by the employers in the multi-employer bargaining unit and \$47,459 was paid in unemployment compensation benefits by the New Mexico Employment Security Commission. (R. 170). Furthermore, during the labor dispute, many of the employees received U.S. Department of Agriculture Food Stamp Assistance and almost all of them received a union strike benefit in the amount of \$50.00 per week. (Stip. Tr. of Proceedings, p.5).

The evidence established that all of the employers suffered an economic burden as a result of the labor dispute. The retail supermarket industry operates on a low profit margin. (Stip. Tr. of Proceedings, p.5). The employers continued to operate their meat markets at less than full capacity by the use of temporary replacements, but even at their height such temporary work forces were considerably smaller in number than their regular crews, ranging from 53.6% to 80.2% of normal strength. (R. 170-172). Most of the employers experienced a decrease in gross sales, some on the order of 13+%, although past experience indicated that an increase in gross sales would normally have occurred during the particular time period in question. (R. 170-173). Most employers experienced higher operating expenses by reason of having to provide lodging, meals, transportation and related services to out of town temporary replacements. (R. 170-173). Most of them were forced to curtail or limit specific operations of their meat departments until the labor dispute was settled, including limiting the availability of special or custom cuts. (R. 171). Finally, most of the employers had to cease their normal methods of operation and rely on the use of pre-cut and pre-packaged products. (R. 171).

## *2. Manner in which the Federal Question was Raised.*

On November 6, 1973, a Motion for Amendment of Petition for Writ of Certiorari was filed with the New Mexico District Court on behalf of Kimbell, Inc., Furr's, Inc., and Allied Supermarkets, Inc. The motion sought permission to amend the Petition for Writ of Certiorari filed earlier on behalf of said employers, which sought review of the decision of the Employment Security Commission of New Mexico permitting payment of unemployment compensation benefits to the striking employees of said employers, by adding thereto an allegation that payment of benefits would contravene the Supremacy Clause of Article VI of the Constitution of the United States. (R. 157). The order permitting the amendment was entered by the district court on November 7, 1973. (R. 160). A similar motion was filed on behalf of Safeway Stores, Inc. and Shop Rite Foods, Inc. on December 3, 1973, and an order permitting the amendments was entered by the district court on the same date. (R. 162-164).

On October 11, 1974, the New Mexico District Court entered its Findings of Fact and Conclusions of Law in which it concluded in pertinent part that:

Under the facts of this case payment of unemployment compensation benefits to the claimants herein would interfere with the national policy of Federal Labor Law of encouraging self organization and collective bargaining without state interference in the use of economic weapons available to both labor and management, including the policies enunciated in 29 USC §§157-158, in contravention of the Supremacy Clause of Article VI of the Constitution of the United States. (R. 174).

On October 25, 1974, the New Mexico District Court entered its judgment denying unemployment compensation benefits

to the claimants. Thereafter on November 8, 1974, the Employment Security Commission of New Mexico filed a Notice of Appeal to the Supreme Court of the State of New Mexico from the judgment of the district court. (R. 176-178).

As Point III of its brief in chief before the Supreme Court of the State of New Mexico, the Employment Security Commission of New Mexico stated the following proposition:

Payment of unemployment compensation benefits to claimants whose unemployment is due to a labor dispute raises no constitutional conflict with federal labor policy under the supremacy clause of Article VI of the United States Constitution. (Appellant's Brief in Chief at 11-12).

Point II of the answer brief of the Appellants herein filed with the Supreme Court of New Mexico consisted of the following assertion:

Payment of unemployment compensation benefits to claimants conflicts with federal labor policy and is therefore unconstitutional under the Supremacy Clause of Article VI of the United States Constitution. (Appellees' Answer Brief, at 22-28).

In its decision in this case, the Supreme Court of the State of New Mexico did not discuss the basis for its reversal, other than by incorporating its decision in *Albuquerque-Phoenix Express, Inc. v. Employment Security Commission*, N.M. , 544, P.2d 1161 (1975) (Appendix, *infra* at pp. 4a-20a. By footnote in its *Albuquerque-Phoenix Express* decision the New Mexico Supreme Court stated:

We note the recent case of *Hawaiian Tel. Co. v. State of Hawaii Dept. of L. & I. Rel.*, F.Supp. (D. Hawaii 1975), wherein the Federal District Court

of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage of work" clause in its Unemployment Compensation Act so impermissably alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U. S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work. . . . N.M. at , 544 P.2d at 1165, n.1. (Appendix, *infra* at p. 11a, n.1).

Appellants herein again raised the constitutional issue in their timely Petition for Rehearing, which was denied by the Supreme Court of New Mexico on January 15, 1975. (Appendix, *infra* at p. 21a).

#### FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL

This case raises fundamental questions concerning the extent and application of the doctrine of federal preemption as developed by this Court in the area of national labor policy. Particularly, it involves the application of the preemption doctrine to the payment of public assistance benefits to strikers under the provisions of state law.

Since the decision of this Court in 1959 in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), it has been clear that the states are preempted by the Supremacy Clause of Article VI of the United States Constitution from interfering with activities arguably either protected or prohibited by §§7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158. *E.g.*, *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964). Where the issue involved, as here,

arises out of activities neither arguably protected nor proscribed by §§7 and 8 of the National Labor Relations Act, the activity may still be preempted. The question then becomes one of determining whether the activity in question disturbs the balance struck by Congress between the conflicting interests of the employees, employers, unions and the community in a labor dispute. *See, e.g., Teamsters Local 20 v. Morton, supra.*

The rationale of *Garmon* and its progeny is well stated by Archibald Cox in an article in the *Harvard Law Review*:

An appreciation of the true character of the national labor policy expressed in the NLRA and LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests.

Two fundamental ideas lie at the core of the national labor policy: (1) freedom of employee self-organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours, and other conditions of employment through the negotiation and administration of collective bargaining agreements. Both may involve resort to strikes, boycotts, lockouts, and other economic pressures. Providing a legal framework for self-organization and collective bargaining involves determining not only how far the conduct of employers and unions should be regulated but also how far they should be free. . . . On every point . . . , formulating the national labor policy requires balancing the various interests of management, union, employees, and the public in deciding which tactics should be prohibited and which should be allowed.

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352-53 (1972).

This Court has not heretofore decided a case in which it has defined the perimeters of Congressional concern for the payment by state governments of public assistance benefits to strikers. The question was considered by this Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) in the context of the payment of state welfare benefits to strikers; however, the issue was not decided, as the case was remanded on another issue. Nonetheless, in his opinion for the Court, Mr. Justice Blackmun clearly noted the substantiality of the federal questions raised in that case, and this, by his observation that:

The New Jersey governmental action rests not on the distant contingencies of another strike and the discretionary act of an official. Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, and in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. *It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract.* The question, of course, is whether

Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

416 U.S. at 123-124 (footnotes omitted and principal emphasis added).

The pervasive effect of payment of public benefits, and specifically unemployment compensation, to strikers and its frustration of the national labor policy is detailed in an exhaustive study prepared by the Industrial Research Unit of the Wharton School of Business at the University of Pennsylvania. The study concludes:

Although the evidence . . . indicates that it is probably unlikely that many persons go on strike in order to receive welfare benefits, it must nevertheless be concluded that one of the effects of the availability of public support for strikers on strikes themselves is to increase the propensity of unions to undertake strikes, and to increase the probability that they will be longer, costlier, or both. If union officials know that the public, rather than the union treasury, will be responsible for the economic security of their members while on strike, and if such public benefits preclude a political reaction of union members and their wives against the economic losses stemming from a strike, then obviously strikes can be undertaken more lightly.

\* \* \* \*

How much in additional sums have been or will be added to wage settlements (and prices) because management regards it futile to risk a strike where strikers are supported by government funds is of course impossible to estimate. When strikes are supported by welfare, food stamps, unemployment compensation, or some combination of these benefits, it does seem quite

clear that the strike cannot effectively, in Dr. George W. Taylor's words, 'serve as the motive power which induces a modification of extreme positions and then a meeting of minds.' Rather, the union is put close to the position where 'there is everything to gain and nothing to lose by trying to get one's unusual demands approved without cost.'

A. Thieblot, Jr. and R. Cowin, *Welfare and Strikes, the Use of Public Funds to Support Strikes*, 217-18 (1972) (footnotes omitted).

Thus far the question of the validity of payment of public assistance to strikers under Article VI of the Constitution of the United States has been specifically passed upon in reported decisions by only two courts, other than the Supreme Court of New Mexico — the First Circuit Court of Appeals in *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), *cert. denied*, 414 U.S. 858 (1973) and *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971), and the United States District Court for the District of Hawaii in *Hawaiian Telephone Co. v. State Department of Labor & Industrial Relations*, 405 F.Supp. 275 (D. Hawaii 1975).

In none of these decisions did the court condone the payment of public assistance benefits to strikers, and in the *Hawaiian Telephone* case the District Court specifically held that to do so would contravene the Supremacy Clause of Article VI of the United States Constitution. However, the approaches adopted by the two courts in considering the application of the preemption doctrine differ widely. The First Circuit has opted to analyze the issue in terms of a balancing of state versus federal interest and in the *Grinnell* and *ITT* cases required the employer to produce evidence of specific injury to sustain a constitutional challenge to the payment of benefits. The Federal District Court of Hawaii,

on the other hand, in *Hawaiian Telephone* defined the problem in application of the preemption doctrine not in terms of balancing the interests of the state and federal government but rather as one of determining the outer limits of Congressional concern. **The court concluded that payment of state unemployment compensation benefits to strikers is unconstitutional on its face.**

Indeed, perhaps the most compelling reason for this Court to consider and decide the issues raised by this appeal is to provide a definitive resolution to the conflict among the lower courts regarding application of the preemption doctrine in cases where, as here, there is no direct conflict between federal and state legislation. It is of utmost importance in order to avoid further confoundment among the lower courts in the wake of this Court's decision in *Super Tire* that guidance be given as to whether in application of the preemption doctrine the courts should "balance" federal and state interests underpinning the two statutes or whether the inquiry should be limited to determining whether there is a conflict between the statutes. The confusion generated by *Super Tire* in this regard is illustrated by the opinion of the district court in *Hawaiian Telephone*. Initially, the opinion refers to an evidentiary hearing "mandated" by *Super Tire*. 405 F.Supp. at 277. However, the district court then questions whether such a hearing is necessary in light of the language of Mr. Justice Blackmun in *Super Tire*, quoted *supra* at pages 11-12, which would seem to eliminate the necessity of a showing of a specific impact. 405 F.Supp. at 277. The district court finally concludes that such a hearing would nevertheless "be of assistance in the ultimate resolution of the problem before this court". 405 F.Supp. at 277.

Because the issue of the payment of unemployment

compensation by states to strikers directly and forcefully affects the operation of national labor policy as developed by Congress and the federal courts it raises a substantial federal question. The validity of such payments under the Supremacy Clause of Article VI of the Constitution of the United States and the analytical approach to be followed in application of the preemption doctrine to state aid to concerted activity in labor disputes should be considered and decided by this Court. The materiality and timeliness of the issue raised by this appeal was underscored in the 1972 Report of the Committee on State Labor Law of the American Bar Association, as follows:

The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion.

A.B.A. Sec. of Lab. Law, 1972 Committee Repts., p. 301 (footnotes omitted).

## CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully Submitted,

ROBERT P. TINNIN, JR.  
PAUL MINES

816 Bank of New Mexico Bldg.  
Albuquerque, New Mexico 87102  
*Attorneys for Appellants*  
Kimbell, Inc., d/b/a Foodway,  
Furr's, Inc., and Shop Rite  
Foods, Inc., d/b/a Piggly Wiggly

JOHN B. TITTMAN

P. O. Drawer AA  
Albuquerque, New Mexico 87103  
*Attorney for Appellant*  
Safeway Stores, Inc.

Dated: April 6, 1976.

## APPENDIX

### Names of All Individual Claimants

#### *Kimbell, Inc., d/b/a Foodway*

Lana Jean Nolan, Lucille Virginia Collins, Danie B. Clingman, Susie Padilla, Clyde R. Duncan, Dorothy L. Gray, Earl W. M. Speis, Dorothy J. Schwach, Jimmy M. Carroll, John Davis, John G. Lucero, Rudolfo Garrillo, Charlie A. Ortega, Beatrice Lopez, Bernal Sanchez, Pola S. Pacheco, Eloy L. Gilbert, Joe C. Chavez, Ruby Sweeney, Frieda V. Rael, Lorraine D. Billings, Dolores A. Vigil, Theresa Saavedra, Dorma Jean Trusty, Pete Aranda, Rosable Griego, Benito R. Baca, Robert P. Chavez, Michael D. Flores, Richard A. Mares, Delubino Jr. Romero, Robert E. Padilla, Agnes Olguin, Joe L. Apodaca, Imogen H. Holiday, Margaret Helen Roach, Ina B. Beck, Wayne Lee Johnson, Kathleen Burke, Judith S. Wiles, Victor Padilla, Jeanne D. Kohlman

#### *Furr's, Inc.*

John M. Cosentino, Arthur L. Bingaman, Bate R. Grise, Louise M. Logan, Willie M. Whitten, Mary M. Noble, Lawrence O. Saul, Frances K. Montoya, Finnimore M. Sanchez, Yoko S. Downey, Joy Barnett, John Carl Wright, Bill D. Cawthon, Bea M. Buffenmeyer, Edna I. Kotschwar, Benny Romero, Jake Aragon, Mary C. Puckett, Thelma Montoya, Aurora D. Baldonado, Admundo C. Bernal, Adolfo J. Trujillo, Paul Pacheco, Jr., Eloy Romero, Fred C. Sandoval, Patricia L. Mutchie, Tommy Torres, Betty A. Thornton, Bee Woodward, Rose J. Lovato, Narciso C. Quintana, Des W. Beevers, Gary J. Miller, David A. Johnson, Charles D. Whitmore, Larry L. Williams, Corine Ortega, Cornalio Padilla, Dolores S. Hemsing, Richard Moore, Armando Gandara, Ronnie Morga, Richard C. Clifton, Jr., James M. Coffman, Sandra Ortiz, Linda E. Snider, Eddie P. Varela, Timothy L. Sandoval, Danny Gutierrez, Sandra L. Seaborn, Jane Elizabeth Cast, Richard J. Mahboub, Jr., Barbara A. Chavez, Phyllis Ann Abel

*Safeway Stores, Inc.*

Stanley S. Skibitski, Ruby G. Burkhardt, Samuel G. Tolley, Clarence P. Dunn, Jack D. Wise, Nancy Shama, John S. Mickler, Delmer Eugene Clem, Horace W. Jones, Carlton R. Burkhardt, Sybil D. Webb, Donna Odell Hatfield, James C. Foster, Michael Shreve, Robert J. Weinheimer, Kathleen G. Romero, Harry J. Welesky, Ruth D. Perea, Donila D. Gallegos, Frank Aranda Griego, Raymond Plunkett, Julian Ortiz, Eyrel A. Moore, Julian Smith, Joseph W. Garcia, John T. Evans, Fidel S. Lopez, Mary Louise Karns, Joe L. Gomez, Tillie Apodaca, Wilma L. Jones, Jimmy Pacheco, Charlie J. Torres, Estella G. Barros, Lillian M. Dennis, Nellie Montoya, Albert M. Gonzales, Pablo O. Lopez, Stella Sanchez, Vincentita Lujan, Maria G. Maes, Christa Dora Sanchez, Ruby E. Wormington, Dovie C. Brown, Minfa O. Sanchez, Samuel Jaramillo, Fred E. Chavez, Manuel D. Lucero, Amadeo Sandoval, Al E. Copeland, Antonio A. Villanueva, Eloy Jaime, Horacio E. Martinez, Fred Montoya, John A. Gerhardt, Robert M. Torres, James C. Chavez, Anthony Cano, Ray E. Luna, Oliver J. Schaffer, Freddy A. Salazar, Jack L. Archer, Frank B. Gurule, Gerald L. Speis, Robert B. Haislip, Donna L. Grubb, Mary Archuleta, Joe A. Arias, Harry Valdez, Maryann S. Sprouse, Perfecto Z. Sanchez, Bunn Hern III, Jose F. R. Maestas, Nancy R. Romero, Virginia A. Lovato, Billy Roybal, Robert Sierra, Billy E. Quintana, Alfonso G. Chavez, Ralph A. Montano, Debbi Ann Alires, Felix Russell Lopez, Andre F. Chene, Tony J. Kozlowski

*Shop Rite Foods, Inc., d/b/a Piggly Wiggly*

Janet Gail Davis, Donald K. Kelley, Tamsye M. Romero, James A. Etherington, Richard N. Schultz, Thomas C. Campbell, Betty Lou Reed, Richard R. Tafoya, Raymond C. Gallegos, Boni Baca, Jose A. Navarro, Randy R. Carter, James H. Ingram, Louis E. Saavedra, Fred C. Encinias, Benny A. Romero, Roger Urioste, Patricia L. Lawson

IN THE SUPREME COURT OF THE  
STATE OF NEW MEXICO

Monday, December 29, 1975

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,  
et al.,

Petitioners-Appellees,

vs.

Bernalillo County

EMPLOYMENT SECURITY COMMISSION  
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,  
Respondent-Claimant  
Employees-Appellants.

APPEAL FROM DISTRICT COURT  
BERNALILLO COUNTY

DECISION

On the basis of the Court's opinion in Albuquerque-Phoenix Express vs. Employment Security Commission (No. 10247, Opinion filed December 24, 1975), the Judgment of the District Court of the Second Judicial District is reversed.

IT IS SO ORDERED.

John B. McManus, Jr., Chief Justice  
Samuel Z. Montoya, Justice  
Dan Sosa, Jr., Justice

WE DISSENT:

LaFel E. Oman, Justice  
Donnan Stephenson, Justice

Filed: December 24, 1975

IN THE SUPREME COURT OF THE  
STATE OF NEW MEXICO

ALBUQUERQUE-PHOENIX EXPRESS, INC.,  
Petitioner-Appellant,

vs.

No. 10,247

EMPLOYMENT SECURITY COMMISSION  
OF NEW MEXICO,  
Respondent-Appellee,

and

ROBERT R. BURGESS, et al.,  
Claimants-Appellees.

APPEAL FROM THE DISTRICT COURT  
OF BERNALILLO COUNTY

FOWLIE, Judge

PICKERING & MAHON  
Albuquerque, N. M.

Attorneys for Appellant

R. BAUMGARTNER, Esq.  
Albuquerque, N. M.

KOOL, KOOL, BLOOMFIELD & EAVES  
Albuquerque, N. M.

Attorneys for Claimants

OPINION

McMANUS, Chief Justice.

This matter was brought in the District Court of Bernalillo County for review upon certiorari of a decision of the

Employment Security Commission (Commission) that certain claimants for unemployment compensation benefits, employees of Albuquerque-Phoenix Express, Inc., petitioner-appellant (Company), who were unemployed as a result of a labor dispute were eligible to receive unemployment benefits. This matter was presented to the court upon briefs and oral argument. From a judgment of the district court dismissing the Company's appeal and affirming the judgment of the Commission, the Company appeals to this Court.

After receiving the decision of the court adverse to it, the Company, by this appeal requests review of the following points:

1. Claimants were not available for work nor were they actively seeking work as required by § 59-9-4(A)(3), N.M.S.A. 1953 Comp.
2. Claimants were disqualified under § 59-9-5(a), N.M.S.A. 1953 Comp., as they left work voluntarily without good cause.
3. The employees should have been disqualified under § 59-9-5(d), N.M.S.A. 1953 Comp., as there was a "stoppage of work" at the Company's premises.
4. Even if "stoppage of work" is defined as a substantial curtailment of the employer's business, such a curtailment did occur.

The first issue raised concerns § 59-9-4(A)(3), *supra*, which provides, in part, as follows:

"A. An unemployed individual shall be eligible to receive benefits with respect to any week *only* if he:

\* \* \* \*

"(3) is able to work and is *available for work* and is *actively seeking work*; \* \* \*" (Emphasis added.)

The Appeals Tribunal for the Commission and the Commission itself, which adopted the ruling of the Appeals Tribunal, determined that twelve of the seventeen claimants were available for and actively seeking work. On this issue, the finding of the Appeals Tribunal, being representative of each of the twelve claimants, read in relevant part, as follows:

"The claimant was required to register for work with the New Mexico State Employment Service as a prerequisite to filing for unemployment benefits. The claimant also sought work through the union ([Teamsters] Local 492), which maintains an out-of-work list and a hiring hall. During several weeks while filing continued claims, he was successful in obtaining temporary work through the union. During about seven of these weeks, he earned more than his weekly benefit amount (\$56.00). The evidence shows that the claimant was available for full-time work had such been offered to him."

The Commission and the court below adopted this finding and we conclude that there was substantial evidence to support such a finding.

The employer seeks to have us interpret the availability and active search for work provisions of § 59-9-4(A)(3), supra, as establishing an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases. Applying this standard to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of § 59-9-5(d), N.M.S.A. 1953 Comp., totally superfluous. (That section will be discussed in more detail in our consideration of "stoppage of work.")

On the basis of individual interviews with each claimant by Commission personnel, written documents and other reports in each claimant's file, and the record before the Commission's Appeals Tribunal, where all parties were represented, the Commission found that the claimants were available for and actively seeking work as required by § 59-9-4(A)(3), supra. The Commission further found that a number of claimants had obtained temporary intervening work, and that picket line duty was not mandatory and did not interfere with the claimants' search for or acceptance of work.

It seems obvious that the claimants herein were already employed by the Company. They expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work. It would not make much sense for the Commission to demand that they, in fact, quit their jobs and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit.

In fact, § 59-9-5(c)(2), N.M.S.A. 1953 Comp., expressly provides:

"Notwithstanding any other provisions of this act [59-9-1 to 59-9-29], no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; \* \* \*."

Another point for review concerns whether or not claimants left work voluntarily without good cause. The Commission held inapplicable, in the case of labor disputes such as we find here, the voluntary leaving provision of § 59-9-5(a), N.M.S.A. 1953 Comp., reading:

"An individual shall be disqualified for benefits—

“(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one (1) nor more than thirteen (13) consecutive weeks of unemployment which immediately follow such week (in addition to the waiting period) as determined by the commission according to circumstances in each case, and such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by his weekly benefit amount.”

In *Inter-Island Resorts, Ltd. v. Akahane*, 46 Haw. 140, 156-58, 377 P.2d 715, 724-25 (1962), the Supreme Court of Hawaii analyzed a provision in the Hawaii Employment Security Law quite similar to our provision, § 59-9-5(a), *supra*, in the following way:

“This argument [that claimants unemployed as the result of a labor dispute should be disqualified under the voluntary leaving provisions of the unemployment compensation law] is in direct conflict with the generally accepted interpretation of the voluntary leaving and the labor dispute disqualification provisions of the various state laws. The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to a ‘stoppage of work’ which exists because of a ‘labor dispute’ cannot be said to have ‘left his work voluntarily’ within the meaning of the voluntary separation provision. *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So.2d 675; *Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Comm.*, *supra*, 328 Mich. 363, 43 N.W.2d 888; *Little Rock Furniture Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56; *Marathon Electric Mfg. Corp. v. Industrial Comm.*, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576; *Lesser, Labor Dispute and Unemployment Compensation*, 55 Yale Law Journal 167.

“It is one of the fundamental tenets of the unemployment compensation law that the administering

agency remain neutral in the labor dispute and refrain from passing on the merits of the dispute. Courts almost unanimously hold that the merits of a labor dispute are immaterial in determining the existence of the dispute, the rationale being that the unemployment compensation fund should not be used for the purpose of financing a labor dispute any more than it should be withheld for the purpose of enabling an employer to break a strike. *Sakrison v. Pierce*, *supra*, 66 Ariz. 162, 185 P.2d 528; *In re Steelman*, *supra*, 219 N.C. 306, 13 S.E.2d 544; *Amory Worsted Mills, Inc. v. Riley*, 96 N.H. 162, 71 A.2d 788; *W. R. Grace & Co. v. California Employment Comm.*, 24 Cal.2d 720, 151 P.2d 215; *Byerly v. Unemployment Comp. Board of Review*, 171 Pa. Super. 303, 90 A.2d 322; *Lawrence Baking Co. v. Michigan Unemployment Comp. Comm.*, *supra* 308 Mich. 198, 13 N.W.2d 260; *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675.

\* \* \* \*

“Moreover, the terms ‘leaving work’ or ‘left his work’ as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. *Kempfer, Disqualification for Voluntary Leaving and Misconduct*, 55 Yale Law Journal 147, 154. Absence from the job is not a leaving of work where the worker intends merely a temporary interruption in the employment and not a severance of the employment relation. Such is the case of strikers who have temporarily interrupted their employment because of a labor dispute. Under the prevailing view, they have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. *T. R. Miller Mill Co. v. Johns*, *supra*, 261 Ala. 615, 75 So.2d 675; *Mark Hopkins, Inc. v. California Employment Comm.*, 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081; *Knight-Morley Corp. v. Michigan Employment Security Comm.*, 352 Mich. 331, 89 N.W.2d 541; *Marathon Electric Mfg. Corp. v. Indus-*

trial Comm., supra, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576."

We fully adopt this reasoning.

The third point upon which appellants rely is that the employees should have been disqualified for unemployment compensation benefits under § 59-9-5(d), N.M.S.A. 1953 Comp., which provides, in part, that:

"An individual shall be disqualified for benefits  
\* \* \*

"(d) For any week with respect to which the commission finds that his unemployment is due to a *stoppage of work* which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or directly interested in the labor dispute which caused the *stoppage of work*; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the *stoppage*, there were members employed at the premises at which the *stoppage* occurs, any of whom are participating in or directly interested in the dispute; \* \* \*." (Emphasis added.)

The appellants claim that the term "stoppage of work" refers to the individual efforts of the employee, while the appellees argue that "stoppage of work" refers to a cessation or substantial curtailment of the employer's business. We are thus called upon to interpret this term.

We are not the first state supreme court to be confronted with this question. All fifty states have adopted unemployment compensation laws, and a majority of them have a provision disqualifying employees from benefits if the "unemployment is due to a stoppage of work which

exists because of a labor dispute \* \* \*." Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chi. L.Rev. 294 (1950); Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urban L. 319 (1967); Annot., 61 A.L.R.3d 693 (1975). About twenty of the states have interpreted the term "stoppage of work" to mean a cessation or a substantial curtailment of the employer's business, while only one — Oklahoma — has interpreted the term to mean a stoppage of the individual work of the employee. Annot., 61 A.L.R.3d 693 (1975). We agree with the majority of states and conclude that the term "stoppage of work," as it is used in the context of our Unemployment Compensation Act, refers to the employer's business rather than the employee's work.<sup>1</sup>

The term "stoppage of work" was originally taken from "Draft Bills" prepared by the Committee on Economic Security, which in turn borrowed the phrase from British Unemployment Insurance Acts. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, supra. Therefore, it is significant to note that:

"When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.'"

Id. at 308.

Were the phrase "stoppage of work" to refer to the employee's work, it would be redundant in the sentence "his

<sup>1</sup>We note the recent case of Hawaiian Tel. Co. v. State of Hawaii Dept. of L. and I. Rel., \_\_\_\_ F.Supp. \_\_\_\_ (D. Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage" of work clause in its Unemployment Compensation Act so impermissibly alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U.S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

unemployment is due to a stoppage of work which exists because of a labor dispute \* \* \*." If the statute read "his unemployment is due to a labor dispute," or "he stopped working because of a labor dispute," then it would be clear that the legislature intended to disqualify from receiving benefits all those employees who stop work because of a labor dispute, no matter how minimal the impact of their stopping is on the employer's operations.

Furthermore, the sentence "He is not participating in or directly interested in the labor dispute which caused the stoppage of work \* \* \*" would be an extremely clumsy way of phrasing the idea, if "stoppage of work" referred to the employee's individual work. In fact, if we interpreted "stoppage of work" in this way, the whole of section (d) would read awkwardly at best. Therefore, a common sense approach to the words in their context leads us to the same conclusion that nearly all other courts have reached — that "stoppage of work" refers to the employer's business.

Finally, it must be stressed that our role in this situation is not to usurp the legislative function. As the Supreme Court of Arizona aptly pointed out in *Sakrison v. Pierce*, 66 Ariz. 162, 165-66, 185 P.2d 528, 530-31 (1947):

"\* \* \* Much is made in counsel's briefs of policy considerations. For example, on the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those whom, among others, the Act was designed to protect (i.e., those who had participated in a labor dispute and lost — at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot

be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. \* \* \* The function of this court, then, is simply to point out which route our legislature has chosen to travel."

Having then concluded that "stoppage of work" means a cessation or substantial curtailment of the employer's business, we are next confronted with the question of whether the employer's business was substantially curtailed at any time during the period from July 20, 1970 until November 30, 1970 when these workers went out on strike. What constitutes a substantial curtailment of work or operations at the employing establishment has generally been regarded by the courts as a question dependent upon the facts and circumstances of each case. Annot., 61 A.L.R.3d 693, 705 (1975). We agree.

The district court determined that the Commission's findings were supported by substantial evidence in the record as a whole, and accordingly adopted and entered the following findings of fact, among others, just as they had appeared in the Commission's decision of August 9, 1971:

"7. Members of Teamster's Local No. 492 who struck the employer's place of business comprised about twenty percent of the employer's total work force.

"8. Immediately after commencement of the strike, the employer began hiring replacements for the striking employees and had replaced as many as necessary to continue normal operations within a few days.

"9. With the exception of some impact on the employer's interline freight business, there was no cessation of normal business activity or curtailment of the work force or productivity at the employer's place of business or establishment during the labor dispute."

The appellant challenges findings 8 and 9 and argues that the labor dispute did cause a substantial curtailment of the employer's business, thereby permitting the labor dispute disqualification provision, § 59-9-5(d), supra, to apply to the claimants here involved. In support of this challenge, appellant refers us to two letters from the attorney for the Company sent to the Commission in which certain unsubstantiated and unsupported figures relating to the curtailment of the Company's business are contained.

In contradistinction to these unverified figures we have the sworn testimony of Duncan A. McLeod, president of the Company, from the transcript of the hearings before the Commission on November 16, 1970. On direct examination, he testified as follows:

"Q Wasn't there any cessation of productive activity at your place of business resulting from this strike at any time?

"A No, not necessarily. We got back and it was operating.

"Q Well, when all these men who are employed, who apparently were employed by you prior to July 20th, who left their work, didn't that interfere with your production at all?

"A Oh, we were a little slow for a few days."

Appellant also refers us to certain pages in the supplemental transcript of record, but we have yet to find any evidence there which casts any doubt upon the accuracy of the district court's findings.

In short, the appellant has failed to demonstrate to us that there is any reason to reject the findings of the Commission and the district court with regard to the impact that the labor dispute had on the employer's business. There was substantial evidence to support the district court's find-

ings 7, 8 and 9, and we conclude that the employer's business did not suffer any substantial curtailment when the employees involved here walked off their jobs.

The judgment of the trial court will be affirmed.

IT IS SO ORDERED.

John B. McManus, Jr.,  
Chief Justice

WE CONCUR:

Samuel Z. Montoya, J.  
Dan Sosa, Jr., J.

OMAN and STEPHENSON, JJ, dissenting.

STEPHENSON, J. (dissenting)

I am unable to agree with the construction placed by the majority upon the Labor Dispute Disqualification section of the New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M.S.A. 1953. The construction of that statute which I believe to be correct would require a decision for the company without reaching the other issues dealt with by the majority. I will accordingly confine my comments to that issue.

The court below found that the claimants were employees of the company and members of a labor union. Failing to reach a mutually satisfactory collective bargaining agreement with the company on economic issues, the union and the employees struck the company's place of business. All of the claimants participated in the strike. Union members who struck the company comprised about twenty percent of the company's total work force. However, under the construction I would place upon the cited statute, this fact is irrelevant.

The Commission contends that "stoppage of work," as that term is used in § 59-9-5(d), refers not to the claimant's work, but to a stoppage or curtailment of the employer's operation. The question is one of first impression in this state. The majority has opted for the Commission's interpretation, but in my opinion the phrase refers to a cessation of work by the employees as a result of a labor dispute, viz. a strike.

I would concede that the statute is awkwardly worded. By parsing the sentence in differing ways and substituting words for phrases, proponents of the two contending theories can endlessly argue that the theory which they espouse is the more reasonable, as the parties have done in their briefs. For example, one could point out that in § 59-9-5 the word "work" is used in each subsection. In the earlier ones the word clearly refers to the employee, and it would be anomalous to apply a different meaning to the work in subsection (d). I eschew this argument as the basis for my opinion, although I agree with the reasoning of the majority in *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.2d 69 (1943). I do not think the statute, however inartfully worded, is that opaque.

I premise my opinion on rather simple and well-settled rules of statutory construction and grammar. This court in its opinion in *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 267 (1941), quoting from *Sutherland on Statutory Construction* § 408 (2 ed. 1904), said:

"Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning."

The court then proceeded to define the doctrine of the last antecedent by quoting from 59 C.J. Statutes § 583 (1932) as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

See also *Hughes v. Samedan Oil Corporation*, 166 F.2d 871 (10th Cir. 1948). Applying these rules to the statute before us, we observe that a "labor dispute" and not a "stoppage of work" must exist at the factory, establishment or other premises.

I agree with the reasoning of the special concurring opinion of Justice Davison in *Board of Review v. Mid-Continent Petroleum Corp.*, supra. Justice Davison stated the definition of the last antecedent rule, quoting from a prior Oklahoma case, to be:

"A limiting clause in a statute is generally to be restrained to the last antecedent, unless the subject matter requires a different construction."

Certainly there is nothing about the subject matter here which requires a different construction. He then continued:

The last antecedent in the statute before us is the "labor dispute," not the "stoppage of work."

A labor dispute may exist at the factory without a "shutdown." Of course, if a labor dispute does result in a shutdown or stoppage of operations at the plant or factory it may result in a stoppage of work for individuals not involved in the labor dispute. Individuals not so involved are the subject of consideration by the legislature in the statutory provisions immediately succeeding the above-quoted language.

It is thus my opinion that the thing which must exist at the factory is, under the terms of the statute, the labor dispute, not the stoppage of work; that when the

labor dispute exists at the factory resulting in a stoppage of work by the individual he is disqualified to receive benefits if he is a participant in the labor dispute and not working by reason of his own voluntary desire, regardless of whether the factory stops or does not stop operating.

My opinion is bolstered by other considerations, though I reach the above conclusion without their aid. I note the statement of policy which the Legislature included in the Act in § 59-9-2 N.M.S.A. 1953.<sup>1</sup> I cannot read the phrase "through no fault of their own" as meaning or implying evil or wrongdoing or that an employee's work stoppage was subject to censure. Board of Review v. Mid-Continent Petroleum Corp., supra. In ordinary parlance it would mean unemployment due to the employee's own volition or at his decision or election. Considering the phrase in § 59-9-2 in that light, it is clear to me that the very purpose of the Act is to provide compensation for those who are involuntarily unemployed. That certainly does not include strikers.

As the majority has pointed out, the conclusion that they have reached is supported by a majority of cases which have passed upon the issue. Most of these cases trace their way back to Lawrence Banking Co. v. Michigan Unemployment C. Com'n, 308 Mich. 198, 13 N.W.2d 260 (1944). That case appears to rely heavily on the English National Insur-

<sup>1</sup>"Declaration of state public policy. As a guide to interpretation and application of this act [59-9-1 to 59-9-29], the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own". (Emphasis added.)

ance Act of 1911 and on cases construing it. Bearing in mind that we are now in the year 1976 and that the issue presented is one of first impression in New Mexico, no reason has been suggested to me as to why we should now adopt a construction placed upon a statute of a foreign country by authorities charged with its administration not long after the turn of the century. In fact I am not at all sure why the Michigan court in Lawrence Baking Co. even addressed the problem which confronts us. The claimants there were not at any material time unemployed because of a labor dispute so far as I can determine from the opinion. To the contrary, they were unemployed because they had been discharged and replaced by others. The strike for all practical purposes, only lasted about fifteen minutes. I further observe that two strong dissents were filed in Lawrence Baking Co. with which I generally agree.

Much is said in the briefs about whether or not a governmental policy of neutrality exists in relation to strikes, a subject touched upon by the majority in its discussion of Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947). Since I do not predicate my opinion upon the existence or non-existence of such a policy, I express no opinion as to its existence. I will content myself with saying that if it does not exist, it should.

Still bearing in mind that we are confronted with an issue of first impression and that we are free to adopt an interpretation of the statute which now best suits our situation, I find it interesting that in more modern times several states have refused to adopt "stoppage of work" language, or have eliminated that language after state courts have allowed unemployment compensation to be paid to strikers. In New York and California "stoppage of work" language is absent and strikers are generally ineligible for benefits. For example, see Cal. Unep. Ins. § 1262 (West 1972); N.Y. Labor Law § 592 (McKinney 1965) (seven week waiting period); Colo. Rev. Stat. Ann. § 8-73-109 (1974). There are about fifteen such states. The Texas statute reads "claimant's work stoppage." Vernon's Tex. Stat. art.

5221b-3 (1971). Two cases decided in the 1950's in Arizona held that stoppage of work referred to the employer's business. *Sakrison v. Pierce*, supra; *Mountain States Tel. & Tel. Co. v. Sakrison*, 71 Ariz. 219, 225 P.2d 707 (1950). Soon thereafter in 1952 the Arizona Legislature deleted "stoppage of work" and disqualified those employees involved in a labor dispute. Ariz. Rev. Stat. Ann. § 23-777 (1971). Michigan also changed its statute after the courts interpreted stoppage of work as the employer's operation. *Lawrence Baking Co. v. Michigan Unemployment C. Com'n*, supra, and Mich. Comp. Laws Ann. § 421.29 (1967).

For the reasons stated, I respectfully dissent.

Donnan Stephenson  
Justice

I CONCUR:

LaFel E. Oman, C.J.

IN THE SUPREME COURT OF THE  
STATE OF NEW MEXICO  
Thursday, January 15, 1976

NO. 10323

KIMBELL, INC., d/b/a FOODWAY,  
et al.,

Petitioners-Appellees,

vs.

Bernalillo County

EMPLOYMENT SECURITY COMMISSION  
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondents-Claimants  
Employees-Appellants.

This matter coming on for consideration by the Court upon motion of Appellees for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that the motion of Appellees for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY  
Rose Marie Alderete  
Clerk of the Supreme Court  
of the State of New Mexico.  
(SEAL)

Filed: March 24, 1976

IN THE SUPREME COURT  
OF THE STATE OF NEW MEXICO

KIMBELL, INC., d/b/a FOODWAY,  
FURR'S, INC., ALLIED SUPER-  
MARKETS, INC., d/b/a K-MART,  
SAFeway STORES, INC., and  
SHOP RITE FOODS, INC., d/b/a  
PIGGLEY WIGGLEY,

Petitioners-Appellees,

v.

No. 10323

EMPLOYMENT SECURITY COMMISSION  
OF NEW MEXICO,

Respondent-Appellant,

and

LANA JEAN NOLAN, et al.,

Respondent-Claimant  
Employees-Appellant.

NOTICE OF APPEAL TO THE SUPREME  
COURT OF THE UNITED STATES

Notice is hereby given that Kimbell, Inc., d/b/a Foodway, Furr's, Inc., Safeway Stores, Inc., and Shop Rite Foods, Inc., d/b/a Piggley Wiggley, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico reversing judgment of the District Court of the Second Judicial District, entered in this action on December 29, 1975, and from the order of the Supreme Court of the State

22a

of New Mexico entered January 15, 1976, denying the Motion of Appellees for a Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

POOLE, TINNIN, DANFELSER & MARTIN

By s/Robert P. Tinnin, Jr.  
Robert P. Tinnin, Jr.  
816 Bank of New Mexico Bldg.  
Albuquerque, New Mexico 87102  
(505) 842-8155  
Attorneys for Kimbell, Inc.,  
d/b/a Foodway, Furr's, Inc.,  
Allied Supermarkets, Inc.,  
d/b/a K-Mart, and Shop Rite  
Foods, Inc., d/b/a Piggley  
Wiggley  
Petitioners-Appellees

KELEHER & McLEOD

By s/John B. Tittman  
John B. Tittman  
P. O. Drawer AA  
Albuquerque, New Mexico 87102  
(505) 842-6262  
Attorneys for Safeway Stores,  
Inc., Petitioner-Appellee

This will certify that on this  
22nd day of March, 1976, in  
compliance with Rule 33(1) of  
the Rules of the Supreme Court  
of the United States, a copy of  
the foregoing Notice of Appeal  
was served upon the following  
being all parties:

23a

R. Baumgartner, Esq.  
Attorney for Respondent-Appellant  
Employment Security Commission  
of New Mexico  
P. O. Box 1928  
505 Marquette NW  
Albuquerque, New Mexico 87103

Gerald R. Bloomfield, Esq.  
Kool, Kool, Bloomfield & Eaves  
Attorneys for Respondent-Claimant  
Employees-Appellant  
1516 San Pedro NE  
Albuquerque, New Mexico 87110

s/Robert P. Tinnin, Jr.